1992

Ryan W. Scarritt v. Rodney K. Orton : Brief of Appellee (Corrected)

Utah Court of Appeals

Michael M. Later, Gregory M. Hess; Kimball, Parr, Waddoups, Brown & Gee; Michael W. Park; The Park Firm; Attorneys for Rodney K. Orton, personal representative/appellee.
David Nuffer, Scott Awerkamp; Snow, Nuffer, Engstrom & Drake; Attorneys for Petitioner/Appellant.

IN THE UTAH SUPREME COURT

IN THE MATTER OF THE ESTATE OF CURTISS S. SCARRITT, Deceased. RYAN W. SCARRITT, Petitioner/Appellant. RODNEY K. ORTON, Personal Representative/ Appellee.	92-0284-CA No. 910478 Priority No. 16

BRIEF OF APPELLEE (CORRECTED)

Appeal from the Order of the
Fifth Judicial District Court for Washington County,
State of Utah

The Honorable J. Philip Eves, Judge

David Nuffer
Scott Awerkamp
SNOW, NUFFER, ENGSTROM & DRAKE
90 East 200 North
P.O. Box 400
St. George, Utah 84771
Telephone: (801) 628-1611

Attorneys for Petitioner/
Appellant

Michael M. Later (A3728)
Gregory M. Hess (A5611)
KIMBALL, PARR, WADDOUPS, BROWN
& GEE
Suite 1300
185 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 532-7840

Michael W. Park (A2516)
1086 South Main Street
P.O. Box 2438
St. George, Utah 84771
Telephone: (801) 673-8689

Attorneys for Rodney K. Orton,
Personal Representative/
Appellee

IN THE UTAH SUPREME COURT

IN THE MATTER OF THE ESTATE OF CURTISS S. SCARRITT, Deceased. RYAN W. SCARRITT, Petitioner/Appellant. RODNEY K. ORTON, Personal Representative/ Appellee.	**No. 910478** Priority No. 16

BRIEF OF APPELLEE (CORRECTED)

Appeal from the Order of the
Fifth Judicial District Court for Washington County,
State of Utah

The Honorable J. Philip Eves, Judge

David Nuffer
Scott Awerkamp
SNOW, NUFFER, ENGSTROM & DRAKE
90 East 200 North
P.O. Box 400
St. George, Utah 84771
Telephone: (801) 628-1611

Attorneys for Petitioner/
Appellant

Michael M. Later (A3728)
Gregory M. Hess (A5611)
KIMBALL, PARR, WADDOUPS, BROWN & GEE
Suite 1300
185 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 532-7840

Michael W. Park (A2516)
1086 South Main Street
P.O. Box 2438
St. George, Utah 84771
Telephone: (801) 673-8689

Attorneys for Rodney K. Orton,
Personal Representative/
Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

JURISDICTION

The Utah Supreme Court has jurisdiction of this appeal under Utah Code Ann. § 78-2-2(3)(j) (1953). The Fifth Judicial District Court for Washington County, State of Utah, certified its Order of Formal Probate of Will, Construction of Will, and Denial of Petition for Declaration of Partial Intestacy as a final order, pursuant to Rule 54(b) of the Utah Rules of Civil Procedure.

ISSUES PRESENTED FOR REVIEW

Petitioner/Appellant Ryan W. Scarritt lists nine separate "Issues for Review" in his brief on appeal. The Petitioner's "issues," however, merely provide a confused and repetitive summary of the Petitioner's arguments. Appellee Rodney K. Orton believes that the following statements better frame the issues presented for review:

1. Whether the District Court erred in concluding that Curtiss S. Scarritt died testate as to all of his real property, where the decedent's Last Will and Testament manifests a clear intent that his personal representative sell the real property and add the proceeds to the Testator's estate for use and distribution under the Will.[1]

2. Whether the District Court erred in concluding that Curtiss S. Scarritt died testate as to all of his personal property, where the decedent's Last Will and Testament makes

---

[1]This issue encompasses Issues a, b, c, d, e, f, and h from Appellant's Brief. [Appellant's Brief, at 1-2.]

various devises of personal property and then expressly provides for distribution of "the remaining items of personal property."[2]

SIGNIFICANT STATUTES

The following statutes provide significant guidance in the determination of this appeal:

> (1) [The Utah Uniform Probate Code] shall be liberally construed and applied to promote its underlying purposes and policies.
>
> (2) The underlying purposes and policies of this code are: . . . (b) To discover and make effective the intent of a decedent in distribution of his property; . . . .

Utah Code Ann. § 75-1-102 (1953).

> The intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this part apply unless a contrary intention is indicated by the will.

Utah Code Ann. § 75-2-603 (1953).

> A will is construed to pass all property which the testator owns at his death including property acquired after the execution of the will.

Utah Code Ann. § 75-2-604 (1953).

> "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

Utah Code Ann. § 75-1-201(33) (Supp. 1991).

> "Personal property" includes every description of money, goods, chattels, effects, evidences of rights in action, and

---

[2]This issue encompasses Issues a, b, d, and i. Issue g has never been an issue in this litigation. [Appellant's Brief, at 1-2.]

> all written instruments by which any pecuniary obligation, right, or title to property is created, acknowledged, transferred, increased, defeated, discharged, or diminished, and every right or interest therein.

Utah Code Ann. § 68-3-12(2)(m) (Supp. 1991).

> The common law of England so far as it is not repugnant to, or in conflict with, the constitution of laws of the United States, or the constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state.

Utah Code Ann. § 68-3-1 (1953).

STATEMENT OF THE CASE

A. Nature of the Case.

This case comes before the Utah Supreme Court on appeal from formal testacy proceedings before the Fifth Judicial District Court in and for Washington County, State of Utah. The District Court rejected Ryan W. Scarritt's petition for a declaration that Curtiss S. Scarritt died partially intestate.

B. Course of Proceedings.

On July 10, 1991, the District Court entered an order informally probating the Last Will and Testament of Curtiss S. Scarritt (the "Will") and appointing Appellee Rodney K. Orton to act as personal representative. [Order For Informal Appointment of Personal Representative, R. 41-42.] On July 12, 1991, Ryan W. Scarritt (the "Petitioner") filed a Petition for Formal Probate of Will, Construction of Will, Declaration of Partial Intestacy, and Supervised Administration (the "Petition"), claiming that Curtiss

S. Scarritt (the "Testator") died partially intestate and that Petitioner was one of the Testator's heirs. [R. 14-17.]

On August 14, 1991, Appellee Rodney K. Orton (the "Personal Representative") filed objections to the Petition, maintaining that the Will disposed of all of the Testator's property, both real and personal, that the Petitioner had been intentionally omitted from the Will, and that the Petitioner therefore had no interest in the Testator's estate. [Response and Objections of Personal Representative to Petition for Formal Probate of Will, Construction of Will, Declaration of Partial Intestacy, and Supervised Administration, R. 94-99.] The Personal Representative also filed an affidavit executed by the attorney who drafted the Testator's Will, supporting the Personal Representative's construction of the Will. [Affidavit of James M. Park in Opposition to Petition of Ryan W. Scarritt, R. 83-87, a true and correct copy of which is included in the Addendum to this brief.] On August 22, 1991, the District Court heard oral arguments on the Petition. [Reporter's Hearing Transcript of August 22, 1991.]

C. Disposition in the District Court.

On September 5, 1991, the District Court issued a Memorandum Decision, holding that the Will effectively disposed of all of the Testator's real and personal property and that the Petitioner had no interest in the Testator's estate. [Memorandum Decision, R. 12-19.] On September 25, 1991, the District Court entered its Order of Formal Probate of Will, Construction of Will, Imposition of

Supervised Administration and Denial of Petition for Declaration of Partial Intestacy (the "Order of Formal Probate"). [R. 29-39.]

The District Court determined that the Testator intended his real property to be sold and the proceeds to be added to his estate for use in paying estate taxes and for distribution under the Will. [Order of Formal Probate, Findings, ¶¶ 19-20, R. 32-33.] The District Court further determined that all of the Testator's personal property passed under the Will. [Order of Formal Probate, Conclusions, ¶¶ 7-14, R. 35-36.] The District Court concluded that the Testator's residual personal property, including the real property proceeds, passed under a provision of the Will disposing of "the remaining items of personal property." [Order of Formal Probate, Conclusions, ¶¶ 10-11, 19, R. 35-36.] The District Court certified the Order of Formal Probate as a final, appealable order under Rule 54(b) of the Utah Rules of Civil Procedure. [Order of Formal Probate, pp. 9-10, R. 37-38.] This appeal followed.

D. Statement of Facts.

The Testator died on June 5, 1991, owning certain real and personal property. [Order of Formal Probate, Findings, ¶¶ 1, 9, R. 30-31.] The only real property the Testator owned at his death was a ranch located near Virgin, Utah (the "Ranch"). [Order of Formal Probate, Findings, ¶ 20, R. 33.] The Testator was unmarried at his death, but he was survived by two sons--Curtiss S. Scarritt, Jr., and the Petitioner. [Order of Formal Probate, Findings, ¶¶

10, 14, R. 31-32.] The Testator left a valid will. [Order of Formal Probate, Findings, ¶¶ 5-7, R. 30.]

The Testator's Will begins with a revocation of all prior wills and codicils and provides directions for disposition of the Testator's remains. [Will, Articles FIRST and SECOND.] The SECOND Article of the Will then directs payment of the Testator's debts:

> I hereby direct that all my just debts, funeral expenses, and expenses of my last illness be made as soon after my death as may reasonably be convenient; I hereby authorize and empower my Executor . . . to settle and discharge [all claims made against the estate].

The THIRD Article contains the main dispositive provisions of the Will. It begins with a broad statement regarding the Testator's estate:

> All the rest, residue, and remainder of my estate, both real and personal, of whatsoever kind and nature and wheresoever the same may be situated of which I shall die seized or possessed to which in any way I may be entitled at the time of my death, with the exception of the Horace S. Scarritt Trust . . . , I give, devise, and bequeath as follows: . . . .

Subsection A of the THIRD Article devises certain Certificates of Deposit. Subsection B devises the sums in the "Ferguson Capital Account." Subsection C devises the Testator's "race horse and related livestock and vehicles." Subsection D devises "[a]ll other livestock and saddle horses." Subsection E.1. devises a sherry set and a shotgun to the Personal Representative.

Subsection E.2. of Article THIRD provides a mechanism for distribution of the "remaining items" of the Testator's "personal property:"

> The distribution of the remaining items of personal property should be determined by Curtiss S. Scarritt, Jr., Rodney K. Orton and James M. Park.

The District Court found it "significant that the testator included in this committee two of his close personal friends and his son Curtiss S. Scarritt, Jr." [Order of Formal Probate, Findings, ¶ 14, R. 31-32.]

The FIFTH Article of the Will directs that all estate and other taxes "shall be paid out of or charged against my Utah estate . . . as if it were a debt and without apportionment."

The SIXTH Article of the Will devises to the Testator's son, Curtiss S. Scarritt, Jr., "all articles of personal, household or domestic use or adornment, . . . excluding only such articles of farm and ranch machinery and equipment, together with horses and other livestock, and such personal property as may be selected and distributed pursuant to the provisions of Article THIRD . . . ."

The SEVENTH Article of the Will expresses the Testator's directions with respect to disposition of the Ranch and any "tangible personal property" not distributed in kind under previous provisions of the Will:

> I hereby direct my Personal Representative to borrow monies against my real property located in Virgin, Utah and to pay whatever sums are necessary for the maintenance, upkeep and preservation of my ranch in Virgin, Utah . . . . All monies borrowed against the real property in Virgin,

> Utah are to be paid back immediately upon the sale of said property. I authorize my Personal Representative to sell all real property, together with all tangible personal property and livestock included in my estate and not effectively disposed of pursuant to Articles THIRD and SIXTH hereof, at such time or times and upon such terms and conditions as shall seem advisable and to add the proceeds of any such sale to my estate.

The NINTH Article of the Will expressly precludes the Petitioner from receiving any of the Testator's estate under the Will:

> I make no provision for my son, Ryan Winthrop Scarritt, for the reason that he will be well-provided for, following my death, under the will of my father, Horace S. Scarritt.

SUMMARY OF THE PERSONAL REPRESENTATIVE'S ARGUMENT

The District Court properly rejected the Petitioner's request for a declaration of partial intestacy, because the Will disposes of all of the Testator's real and personal property. The primary purpose of the Utah Uniform Probate Code is to "discover and make effective" the decedent's intent in the distribution of his or her property. The "paramount objective" in interpreting a will is, therefore, to give effect to the testator's intent. The testator's intent must be determined by considering all of the provisions of the will. One of the most significant canons of construction for determining the testator's intent is the statutory presumption that a testator intends to pass all of his or her property under the will and avoid intestacy. This presumption is so strong that this Court has stated that it will adopt "any reasonable construction

[of a will] to avoid a conclusion of intestacy." In light of this presumption, the Petitioner must establish that the **only** reasonable construction of the Testator's Will results in intestacy.

Petitioner cannot prevail because there is a reasonable construction of the Will that disposes of all of the Testator's real and personal property. The SEVENTH Article of the Will directs the Personal Representative to sell the Testator's real property and to add the proceeds to the estate for use and distribution under the Will. The doctrine of equitable conversion provides that when a testator directs his or her real property to be sold, the property must be regarded as personal property from the time of testator's death and must be distributed according to the testator's plan of personal property distribution. A testator's intent to convert realty to personalty may be shown by express instruction, by implied direction, or by necessity in order to carry out all of the provisions of the will. The Will at issue in this case clearly converts the Testator's real property into personal property.

The Testator disposed of all of his personal property under the THIRD and SIXTH Articles of the Will. The SIXTH Article disposes of "all articles of personal, household or domestic use or adornment," with certain exceptions. The THIRD Article of the Will makes various devises of personal property and then grants a power of appointment to two of the Testator's close friends and his son to distribute "the remaining items of personal property." This language may reasonably be construed to dispose of the residue of

the Testator's personal property, including the real property proceeds. This construction is confirmed by: (1) the broad definitions of the terms "personal property" and "items of . . . personal property" contained in the Utah Code; (2) the numerous provisions in the Will that are inconsistent with a claim of intestacy; and (3) the Testator's use of different terms to refer to various types of personal property. Alternatively, the Testator's bequest of "all articles of personal, household, or domestic use" in the SIXTH Article of the Will may reasonably be construed to dispose of the personal property residue.

ARGUMENT

POINT I

THE WILL MUST BE CONSTRUED TO EFFECTUATE THE TESTATOR'S INTENT.

The primary purpose of the Utah Uniform Probate Code is "to discover and make effective the intent of a decedent in distribution of his property." Utah Code Ann. § 75-1-102 (1953). "The intention of a testator as expressed in his will controls the legal effect of his dispositions." Id. § 75-2-603. Thus, "[t]he paramount objective in interpreting a will is to give effect to the intent and desire of the testator . . . ." In re Estate of Wallich, 18 Utah 2d 240, 420 P.2d 40, 42 (1966). In order to determine the testator's intent, the will "should be read and understood as a whole, and meaning given to all of its provisions considered in their relationship to each other." In re Estate of

Wallich, 420 P.2d at 42; see also In re Estate of Gardner, 615 P.2d 1215, 1217 (Utah 1980).

POINT II

PETITIONER MUST OVERCOME THE STRONG PRESUMPTION AGAINST INTESTACY.

The Utah Uniform Probate Code establishes a strong presumption that a testator, in making a will, intends to dispose of all of his or her property and avoid intestacy in whole or in part:

> A will is construed to pass **all property** which the testator owns at his death including property acquired after the execution of the will.

Utah Code Ann. § 75-2-604 (1953) (emphasis added). Those claiming that a testator intended to die intestate bear the burden of establishing that intent. See Id. § 75-3-407.

In the case of In re Estate of Gardner, 615 P.2d 1215 (Utah 1980), this Court explained the practical, legal effect of the presumption against intestacy:

> Based on the presumption against intestacy, the court will adopt **any reasonable construction** [of a will] to avoid a conclusion of intestacy.

Id. at 1217 (emphasis added). Numerous other jurisdictions follow the identical standard. See, e.g., Booth v. Krug, 368 Ill. 487, 14 N.E.2d 645, 649 (1938) ("The presumption against intestacy is so strong that the court will adopt any reasonable construction to avoid it"); Estate of Rose v. Loucks, 772 S.W.2d 886, 889 (Mo. Ct.

App. 1989); Smith v. Estate of Peters, 741 P.2d 1172, 1175 (Alaska 1987).[3]

In this case, Petitioner claims that he is entitled to a portion of the Testator's assets by way of intestate succession. The Will effectively precludes Petitioner from making any claim under the Will. [Last Will and Testament, NINTH Article.] See, e.g., In re Estate of Jones, 759 P.2d 345, 348-50 (Utah Ct. App. 1988) (parent may intentionally omit child from will). Since this Court will adopt "any reasonable construction" of the Will to avoid intestacy, In re Estate of Gardner, 615 P.2d at 1217, and Petitioner is claiming that the Testator died intestate as to most of his property, Petitioner must establish that the **only** reasonable construction of the Will results in intestacy.

POINT III

THE TESTATOR'S WILL DISPOSES OF ALL OF HIS REAL PROPERTY UNDER THE DOCTRINE OF EQUITABLE CONVERSION.

Petitioner claims that the Testator died completely intestate as to his real property. Petitioner argues that the Testator made no provision in his Will for the disposition of real property and that the SEVENTH Article of the Will recognizes that there would

---

[3]The presumption against intestacy is so firmly established as to be beyond dispute. See, e.g., Hoover v. Sims, 792 S.W.2d 171, 174 (Tex. Ct. App. 1990), writ denied; In re Estate of Bennett, 789 P.2d 446, 448 (Colo. Ct. App. 1989), cert. denied (Colo. 1990); New Mexico Boys' Ranch, Inc. v. Hanvey, 97 N.M. 771, 643 P.2d 857, 859 (1982); In re Estate of Ikuta, 64 Haw. 236, 639 P.2d 400, 406 (1981) ("The law abhors intestacy and presumes against it"); In re Estate of Foster, 82 Nev. 97, 411 P.2d 482, 483 (1966); In re Trust Estate of Weill, 48 Haw. 553, 406 P.2d 718, 724 (Haw. 1965).

be real property left in the estate. [Appellant's Brief, at 14-15.] These contentions must be rejected.

A. The Will Mandates a Sale of the Testator's Real Property.

The Testator's directions concerning the disposition of his real property are contained in Article SEVENTH of the Will. The Petitioner notably avoids quoting all of the pertinent language of that section. The SEVENTH Article provides:

> **I hereby direct** my Personal Representative to borrow monies against my real property located in Virgin, Utah and to pay whatever sums are necessary for the maintenance, upkeep and preservation of my ranch in Virgin, Utah and also the salaries of my employees **until such time as the ranch is sold** . . . . All monies borrowed against the real property in Virgin, Utah are to be paid back immediately **upon the sale of said property.** I authorize my Personal Representative to sell all real property, together with all tangible personal property and livestock included in my estate and not effectively disposed of pursuant to Articles THIRD and SIXTH hereof, at such time or times and upon such terms and conditions as shall seem advisable **and to add the proceeds of any such sale to my estate.**

[Last Will and Testament, Article SEVENTH (emphasis added.)

This language, when read in full, clearly conveys the Testator's intent that his real property be sold. The Testator directs the Personal Representative to borrow money against the real property for maintaining the Ranch "until such time as the ranch is sold." The Testator then requires that such loans be

repaid "immediately upon the sale of said property." These provisions create a scheme which mandates the sale of the Ranch.[4]

In addition, this interpretation is the only construction of the Will that is consistent with the other provisions of the Will. The SECOND Article of the Will directs the personal representative to pay all of the Testator's "just debts, funeral expenses, and expenses of [his] last illness . . . ." The FIFTH Article of the Will further provides that "any inheritance, succession, estate, transfer, legacy or duty or tax which shall become payable . . . in respect to any property or interest passing under this [Will] . . . **shall** be paid out of or charged against my Utah estate in the manner hereinabove provided, as if it were a debt and without apportionment." (Emphasis added.)

It is undisputed that the Testator's estate lacks sufficient assets for the payment of his debts, the estate taxes, the costs of administration, and the costs of maintaining the Ranch, while at the same time satisfying the specific bequests made in the Will. The **only** possible way to effectuate the Testator's intent with respect to all of these provisions is to sell the Ranch and use the proceeds for the payment of these costs and expenses. Since the Testator is presumed to have been aware of the nature and extent

---

[4]This construction of the SEVENTH Article is consistent with the pattern set by the Testator in the SECOND Article of the Will. The SECOND Article states: "I hereby direct [payment] of all my just debts . . . ." It then provides authorization: "I hereby authorize and empower my executor . . . to settle and discharge [claims made against the estate]." The SEVENTH Article of the Will also begins with the command, "I hereby direct," and follows with the requisite authorization.

of his estate, and the fact that his assets were insufficient to carry out his objectives without a sale of the real property, see In re Suppes' Estate, 185 A. 616, 617 (Pa. 1936), the inescapable conclusion is that the Testator intended his real property to be sold to accomplish his purposes.

The THIRD Article of the Will also confirms this construction of the Will. It states that "All the rest residue, and remainder of my estate, **both real and personal**, of whatsoever kind and nature and wheresoever the same may be situated of which I shall die seized or possess to which in any way I may be entitled at the time of my death . . . , I give, devise, and bequeath as follows . . . ." (Emphasis added.) This language clearly expresses the Testator's intent to dispose of all his assets under the Will, including his real property. The fact that the subsections of Article THIRD do not mention real property only confirms the fact that the Testator understood and intended that his real property would be sold pursuant to the SEVENTH Article of the Will.[5]

---

[5]The presumption against intestacy is so strong that courts in some instances have even construed the term "personal property" to include a decedent's real property. See, e.g., Davisson v. Sparrow, 97 N.E.2d 694, 695 (Ohio Ct. App. 1949); Gilkey v. Chambers, 146 Tex. 355, 207 S.W.2d 70, 73 (1947); In re Estate of Olsen, 9 Cal. App. 2d 374, 50 P.2d 70, 73 (Cal. Ct. App. 1935). These courts simply interpret the term "personal property" to mean property which the testator owned "personally." See id.

In this case, the decedent made a devise in the THIRD Section of the Will of his "remaining items of personal property." [Will, Article THIRD, E.2.] The opening paragraph of that Section devises "All the rest, residue, and remainder of [decedent's] estate, **both real and personal**, of whatsoever kind and nature and wheresoever . . . situated . . . ." In light of this language, and the strong presumption against intestacy, the Court could conclude that the decedent's real property passes under the THIRD Section of the Will.

Despite these clear manifestations of the Testator' intent, Petitioner claims that "[t]he Will contains a provision dealing with real estate which is consistent with its [purported] failure to dispose of any real property." [Appellant's Brief, at 14.] Petitioner argues that "the SEVENTH Article of the Will is an authorization for the personal representative to 'sell all real property" included in the estate 'not effectively disposed of pursuant to Articles THIRD and SIXTH hereof' . . . ." [Id. (Emphasis Petitioner's).] Petitioner contends that this language "specifically recognizes" that real property would remain in the estate after the dispositions made in Articles THIRD and SIXTH. [Id.]

This argument does not withstand even the most rudimentary textual analysis. The provision in question, which Petitioner only partially quotes, reads as follows:

> I authorize my Personal Representative to sell all real property, **together with all tangible personal property and livestock included in my estate and not effectively disposed of pursuant to Articles THIRD and SIXTH hereof,** at such time or times and upon such terms and conditions as shall seem advisable and to add the proceeds of any such sale to my estate.

[Last Will and Testament, Article SEVENTH (emphasis added).] The structure and punctuation of this sentence clearly demonstrates that the clause "included in my estate and not effectively disposed of pursuant to Articles THIRD and SIXTH hereof" does **not** apply to the term "real property" but applies only to the Testator's "tangible personal property." This language, therefore, does not indicate that there would be real property remaining in the

Testator's estate after all distributions are made. It merely recognizes that some of the Testator's "tangible personal property" may not be distributed in kind under the THIRD and SIXTH Articles of the Will and should, therefore, be sold and distributed as money.[6]

To the extent that Petitioner is attempting to create an ambiguity in the SEVENTH Article of the Will, Utah law provides two means of resolving the dispute. First, the presumption against intestacy obliges the Court to adopt "any reasonable construction" of the Will that "avoid[s] a conclusion of intestacy." In re Estate of Gardner, 615 P.2d at 1217; see Utah Code Ann. § 75-2-604 (1953). In light of the other provisions of the Will, the Personal Representative's construction of the SEVENTH Article not only provides a reasonable construction of the Will, it is the only reasonable construction. Second, to the extent that the SEVENTH Article of the Will is ambiguous, extrinsic evidence is admissible to show the Testator's intent. See Estate of Ashton v. Ashton, 804 P.2d 540, 542-43 (Utah Ct. App. 1990); Godfrey v. Chandley, 248 Kan. 975, 811 P.2d 1248, 1251 (1991). The extrinsic evidence in this case indicates that the Testator intended his Ranch to be sold and the proceeds to be used to pay his debts, the estate taxes, and

---

[6]Furthermore, the Testator's reference in the SEVENTH Article to "any such sale" does not indicate that a sale of the Ranch is discretionary. That same sentence of Article SEVENTH also refers to a sale of any "tangible personal property" not effectively disposed of under the THIRD and SIXTH Articles of the Will. Since a sale of "tangible personal property" was not inevitable (it could all be distributed in kind under Articles THIRD and SIXTH) it was perfectly consistent for the Testator to refer to "any such sale" of that property.

the expenses of administration. [Affidavit of James M. Park ¶ 12, R. 86.] The SEVENTH Article of the Will must, therefore, be construed as a mandate that the Personal Representative sell the Testator's real property.

B. The Will Converts the Testator's Real Property into Personalty under the Doctrine of Equitable Conversion.

Petitioner next contends that the Will does not convert the Testator's real property into personal property for purposes of distribution. [Appellant's Brief, at 16.] Petitioner maintains that the District Court improperly invoked the doctrine of equitable conversion in concluding that the Testator's real property passed under the Will as personal property. Petitioner advances three arguments to avoid application of that doctrine in this case: (1) the doctrine of equitable conversion by will is not the law in Utah; (2) equitable conversion does not apply unless a will contains a mandatory direction to sell real property; and (3) **any** discretion with respect to the sale of the real property prevents application of the doctrine. [Appellant's Brief, at 16-18.] These contentions must be rejected.

1. The doctrine of equitable conversion provides the rule of decision in this case.

The doctrine of "[e]quitable conversion is generally defined as that change in the nature of property by which, for certain purposes, real estate is considered as personalty or personalty is considered as realty and the property is transmissible as so considered." Parson v. Wolfe, 676 S.W.2d 689, 691 (Tex. Ct. App. 1984). (emphasis added); see, e.g., Holzhauser v. Iowa State Tax

Comm'n, 62 N.W.2d 229, 232 (Iowa 1953); In re Livingston's Estate, 9 P.2d 159, 163 (Mont. 1932); Citizens' Nat'l Bank v. First Nat'l Bank, 222 P. 935, 937 (N.M. 1924). As the court explained in Lampman v. Sledge, 502 S.W.2d 957 (Tex. Ct. App. 1973):

> The most common case of equitable conversion occurs where the provisions of a will expressly or impliedly direct that the testator's real property be sold and the proceeds distributed. In contemplation of law the realty will be deemed sold as of the date of the death of the testator, and for the purpose of distribution will be treated as personalty and not as land.

Id. at 959.

The effects of this rule are binding upon the courts and all persons concerned with the property:

> [T]he doctrine of equitable conversion is a rule of necessity, not of convenience. It is a rule of necessity in the sense that, when a person has exercised a power over his property, as he has a right to do, by will or deed, the change in the character of the property which he has directed becomes binding upon all persons thereafter concerned with the same.

Citizens' Nat'l Bank, 222 P. at 940.

Petitioner correctly points out that there are no reported Utah cases applying the doctrine of equitable conversion by will.[7] That fact, however, does not mean that the doctrine of equitable conversion by will is inapplicable in Utah. Section 68-3-1 of the Utah Code provides:

---

[7]Petitioner concedes, of course, that this Court has applied the doctrine of equitable conversion by contract. [Appellant's Brief, at 16.]

> The common law of England so far as it is [consistent with federal and state law and policy] is hereby adopted, **and shall be the rule of decision in all courts of this state.**

Utah Code Ann. § 68-3-1 (1953) (emphasis added).

This Court has explained that Section 68-3-1 adopts the common law of England as it has been adopted and expounded by the courts of last resort of this country. Cahoon v. Pelton, 9 Utah 2d 224, 342 P.2d 94, 98 (1959); see also State v. C.R., 797 P.2d 459, 463 (Utah Ct. App. 1990). The term "common law" is broadly defined as that great body of non-statutory or unwritten law which is founded on custom and usage and in which the courts have long acquiesced. 15A Am. Jur. 2d, Common Law § 1 (1976); see, e.g., Windust v. Department of Labor & Indus., 52 Wash. 2d 33, 323 P.2d 241, 243 (1958).

Equitable conversion by will fully satisfies the requirements of Section 68-3-1. The doctrine was first developed in the courts of England over three hundred years ago. Parson, 676 S.W.2d at 691. It has since been adopted and expounded by an overwhelming majority of courts in this country.[8] While this Court has not yet

---

[8]The doctrine of equitable conversion by will is so firmly rooted in the common law of this country as to be beyond dispute. See, e.g., Parson, 676 S.W.2d at 691 (Texas); Dinkins v. Conyers, 382 So.2d 1129, 1131 (Ala. 1980); Atkinson v. Van Echaute, 366 S.W.2d 273, 274 (Ark. 1963); Holzhauser, 62 N.W.2d at 232 (Iowa); Kikel v. Kikel, 372 Pa. 200, 93 A.2d 443, 445 (1953); Wollard v. Sulier, 55 N.M. 326, 232 P.2d 991, 994 (1951); Elmore v. Austin, 232 N.C. 13, 59 S.E.2d 205, 213 (1950); Kuiken v. Simonds, 3 N.J. 480, 70 A.2d 740, 743 (1950); Zulver Realty Co., Inc. v. Snyder, 62 A.2d 276, 279 (Md. Ct. App. 1948); In re Ellertson's Estate, 157 Kan. 492, 142 P.2d 724, 729 (1943); Hahn v. Verret, 11 N.W.2d 551, 559 (Neb. 1943); In re Livingston's Estate, 9 P.2d at 159 (Mont.); Trotter v. Van Pelt, 198 So. 215, 218 (Fla. 1940); John v. Turner, 6 S.E.2d 480, 482 (W. Va. 1939); In re Rowland's Estate, 273 N.Y.

had occasion to address equitable conversion by will, the Court has recognized the doctrine of equitable conversion by contract. See, e.g., Butler v. Wilkinson, 740 P.2d 1244, 1255 (Utah 1987). As will be shown below, the doctrine of equitable conversion by will is completely consistent with Utah law and policy. The doctrine of equitable conversion by will is, therefore, the law of this State and provides the rule of decision in this case. See Utah Code Ann. § 68-3-1 (1953); Cahoon, 342 P.2d at 98.

2. A will need not contain a mandatory instruction to sell in order to cause an equitable conversion.

Petitioner quotes several general statements from various secondary sources to argue that "if a will does not contain a mandatory instruction to sell the real estate, the real estate cannot be converted and pass as personal property." [Appellant's Brief, at 17.][9] Petitioner fails to note, however, that the

---

100, 6 N.E.2d 393, 395 (1937); Reynold's Executor v. Reynolds, 218 S.W. 1001, 1003 (Ky Ct. App. 1920); In re Stephenson's Estate, 177 N.W. 579, 583 (Wis. 1920); Grove v. Willard, 280 Ill. 247, 117 N.E. 489, 492 (1917); Greenman v. McVey, 126 Minn. 21, 147 N.W. 812, 813-14 (1914); Martin v. Preston, 94 P. 1087, 1089 (Wash. 1908); In re Pforr's Estate, 77 P. 825, 827 (Cal. 1904). Many of these jurisdictions have adopted the Uniform Probate Code, as has Utah. See 8 Uniform Laws Annotated, Estate, Probate and Related Laws, at 1 (1983 & Supp. 1991).

[9]Petitioner attempts to bolster this argument by contending that equitable conversion by contract under Utah law applies only when the duty to sell is "absolute." That statement is inaccurate. An earnest money agreement, for example, effects an equitable conversion of real property even though the agreement is subject to conditions. Lach v. Deseret Bank, 746 P.2d 802, 805 (Utah Ct. App. 1987); see also Butler v. Wilkinson, 740 P.2d 1244, 1255 (Utah 1987) ("The vendor's retention of legal title is usually coupled with a contract right to forfeit the vendee's interest and to take back the vendee's interests if the vendee defaults").

In any event, equitable conversion by will and equitable conversion by contract rest on different grounds. See Parson, 676

secondary sources on which he relies explain that a testator's direction to sell real property "may be express or implied," 27 Am. Jur. 2d, Equitable Conversion § 5, at 487 (1966), and that the power of sale conferred by a will need not be "in terms imperative" in order to work an equitable conversion. Id. § 7, at 491.[10] The Petitioner's claim that a will must contain an express command to sell real property in order to cause an equitable conversion must, therefore, be rejected. Cases applying the doctrine of equitable conversion confirm this conclusion.

The "sole purpose of the doctrine [of equitable conversion] in the case of a will is to effectuate [the] testator's intent." McCaughna v. Bilhorn, 10 Cal. App. 2d 674, 52 P.2d 1025, 1928 (1935); accord Funk v. Funk, 563 N.E.2d 127, 129 (Ind. Ct. App.

S.W.2d at 691 n.2 (quoting Simpson, Legislative Changes in the Law of Equitable Conversion by Contract, 44 Yale L.J. 559, 561 n.10 (1935) (equitable conversion by will "depends on the intention of the testator," whereas equitable conversion by contract is based upon "rules of law as to consequences of the right to specific performance of a land contract").

[10] Since a direction to sell [real property] need not be express in order for it to be imperative, and it can be implied in a proper case, if a testator authorizes his executors to sell his real estate and it is apparent from the general provisions of the will that it was his intention that the power to sell so conferred by him should be exercised, such power will be construed as a direction to sell and will operate as an equitable conversion, **although it is not in terms imperative.**

27 Am. Jur. 2d Equitable Conversion § 7, at 491 (1966) (footnotes omitted) (emphasis added); see also Page, Page on Wills § 46.3 (stating that a power of sale which "may be exercised **entirely** at the discretion of the executors or trustees, does not, **of itself**, work a conversion").

1990); Parson, 676 S.W.2d 689 (Tex. Ct. App. 1984); Citizen's Nat'l Bank, 222 P. at 937-38. The doctrine "is grounded on the maxim that equity regards as done that which in fairness and good conscience should be done." Parson, 676 S.W..2d at 691; accord Wollard v. Sulier, 55 N.M. 326, 232 P.2d 991, 994 (1951); Kuiken v. Simonds, 3 N.J. 480, 70 A.2d 740, 743 (1949). The testator's intent is, therefore, "of paramount and controlling importance" in determining whether a will converts real property to personalty. Wollard, 232 P.2d at 994 (quoting Citizens' Nat'l Bank, 222 P. at 937); accord Atkinson v. Van Echaute, 366 S.W.2d 273, 274 (Ark. 1963) ("Intent is the determining factor"); In re Ellertson's Estate, 157 Kan. 492, 142 P.2d 724, 729 (1943); McCaughna, 52 P.2d at 1025; In re Edwards' Estate, 168 Pa. Super. 471, 79 A.2d 138, 140 (1951); Trotter v. Van Pelt, 198 So. 215, 218 (Fla. 1940); Talbott v. Compher, 110 A. 100, 101 (Md. Ct. App. 1920); Grove v. Willard, 280 Ill. 247, 117 N.E. 489, 492 (1917).

A testator's intent to convert real property into personal property may be shown in three different ways: (1) a positive direction to sell, (2) an implied direction to sell, or (3) necessity to sell in order to carry out the provisions of the will. See, e.g., Wollard, 232 P.2d at 994-95; McCaughna, 52 P.2d at 1028; Citizens' Nat'l Bank, 222 P. at 938; Martin v. Preston, 94 P. 1087, 1089 (Wash. 1908); In re Pforr's Estate, 77 P. 825, 827 (Cal. 1904); Lampman, 502 S.W.2d at 959; Zulver Realty Co., Inc. v. Snyder, 62 A.2d 276, 279 (Md. Ct. App. 1948); Hahn v. Verret, 11

N.W.2d 551, 559 (Neb. 1943); In re Stephenson's Estate, 177 N.W. 579, 583 (Wis. 1920); Grove, 117 N.E. at 492.

An implied direction to sell arises when consideration of the entire will shows that the testator intended his or her real property to be sold, even though the will simply authorizes rather than commands a sale of the real property:

> [T]he inquiry is always as to the intention of the testator. It is not so much the words that he employs as it is his intention as derived from the entire instrument. The whole theory of conversion rests upon the intention of the testator. That is the great guide in determining whether there has been an equitable conversion of realty into personalty. There have been many cases where there was no express direction to sell, but where it was apparent from the general provisions of the will that the testator intended the real estate to be sold. In these cases it has been universally held that a direction would be implied, and an equitable conversion worked.

Greenman v. McVey, 126 Minn. 21, 147 N.W. 812, 813-14 (1914); accord McCaughna, 52 P.2d at 1028; Citizens' Nat'l Bank, 222 P. at 938; In re Pforr's Estate, 77 P. at 827; see also Martin, 94 P. at 1089; Hahn, 11 N.W.2d at 559.

A testator's direction to sell arises by necessity where the personal representative is authorized to sell real property and a sale is necessary in order to carry out the provisions of the will:

> [W]here the provisions of a will cannot be carried out without converting the realty into personalty, and the conditions are such that the testator must have contemplated that such conversion would take place to that end, courts of equity deal with the estate as personal property from the time the will takes effect--from the death of the testator.

Hahn, 11 N.W.2d at 559; accord Citizens' Nat'l Bank, 222 P. at 938; In re Bondy's Estate, 118 N.Y.S.2d 93, 96 (Sur. Ct. 1952); In re Stephenson's Estate, 177 N.W. at 583; Greenman, 147 N.W. at 814. This condition occurs most frequently when the testator has not otherwise provided sufficient assets for the payment of debts, taxes, and/or expenses of administration. See, e.g., Wollard, 232 P.2d at 994; In re Edwards' Estate, 79 A.2d at 140; Zulver Realty Co., 62 A.2d at 279; Hahn, 11 N.W.2d at 560; Camden Trust Co. .v Haldeman, 33 A.2d 611, 614 (N.J. Ch. 1943), aff'd, 40 A.2d 601 (N.J. 1945).

When a direction to sell real property is implied from the testator's intent or established by necessity, the duty to sell becomes as mandatory as if it had been expressly commanded:

> When the direction to convert is apparent from the whole will, whether expressed or implied, the duty and obligation to convert are imperative.

Grove, 117 N.E. at 492; accord Citizens' Nat'l Bank, 222 P. at 938 ("This implied intention . . . becomes as mandatory on the executors and trustees, and as effectual to work conversion as if so expressed in the will"); Greenman, 147 N.W. at 814; see also McCaughna, 52 P.2d at 1028 ("While the desire of a testator for the disposal of his estate is a mere request when addressed to his devisee, it is to be construed as a command when addressed to his executor"). An implied duty to sell, therefore, fully satisfies the purported requirement that the duty to sell must be "mandatory" or "absolute" in order to work an equitable conversion. See, e.g., Greenman, 147 N.W. at 813-14.

3. Discretion as to the time, terms, and manner of sale does not defeat equitable conversion.

Petitioner also implies that the doctrine of equitable conversion cannot be applied if the personal representative has any discretion regarding the sale of the testator's real property. [Appellant's Brief, at 17.] That implication is erroneous. The fact that a personal representative "is vested with some discretion as to the time, terms, and manner of sale does not militate against the doctrine of equitable conversion." Trotter, 198 So. at 218; accord In re Livingston's Estate, 9 P.2d at 163; In re Myers' Estate, 234 Iowa 502, 12 N.W.2d 211, 213 (1943); Talbott, 110 A. at 102); Grove, 117 N.E. at 492. To conclude otherwise would be to defeat the testator's intent. See id.

4. This Court should reject the rigid, mechanical approach advanced by Petitioner.

The flexible approach described above is completely consistent with, and actively promotes, the policies and purposes of the Utah Uniform Probate Code. The main purpose of the Utah Uniform Probate Code is "to discover and make effective the intent of a decedent's in distribution of his [or her] property." Utah Code Ann. § 75-1-102 (1953); see also In re Estate of Wallich, 420 P.2d at 42. The "sole purpose" of the doctrine of equitable conversion is to effectuate the decedent's intent. McCaughna, 52 P.2d at 1028. Under Utah law, the testator's intent, as expressed in his or her will, controls the legal effect of his or her dispositions. Utah Code Ann. § 75-2-603 (1953). Under the doctrine of equitable conversion, the testator's intent, as expressed in his or her will,

is of "paramount and controlling importance." Wollard, 232 P.2d at 994. These principles, therefore, confirm and complement each other.

This Court has also indicated that a will should be examined in its entirety, "and meaning given to all of its provisions considered in their relationship to each other," in order to determine the testator's intent. In re Estate of Wallich, 420 P.2d at 42. A flexible approach to equitable conversion advances this policy, because it permits and encourages the court to determine the testator's intent by examining the entirety of the will, see In re Livingston's Estate, 9 P.2d at 163, rather than by focusing on one or two isolated phrases. As the court stated in Kikel v. Kikel, 372 Pa. 200, 93 A.2d 443, 445 (1953):

> [Q]uestions [concerning equitable conversion] cannot be decided by rigid mechanical application of any formula but require in each case a determination of the intention of the testator as revealed in his will.

Kikel, 93 A.2d at 445. A flexible approach to equitable conversion is also consistent with the presumption against intestacy. See Utah Code Ann. § 75-2-604 (1953); Greenman, 147 N.W. at 814.

In contrast, the approach advanced by Petitioner would require that a will contain an express command to sell in order to effect an equitable conversion. [See Appellant's Brief, at 16-17.] This rigid, mechanical approach is fundamentally inconsistent with Utah law and policy. See Utah Code Ann. § 75-1-102 (1953); In re Estate of Wallich, 420 P.2d at 42. Such an approach would condition the effect of a testator's dispositions on an incantation of key words

and phrases, rather than on the testator's intent as shown by the entirety of the will. It would defeat the testator's intent in every instance where the will manifests a clear implied intent that the real property be sold but does not contain an express command to sell. It would also defeat the testator's intent in every instance where a sale of real property is necessary to carry out the testator's testamentary plan, but the will contains no express command to sell.

The Petitioner's approach would also discriminate against those who are compelled or choose to draft their own wills, see, e.g., Utah Code Ann. § 75-2-503 (1953) (validating holographic wills), since many such individuals would be unlikely to know the formal requirements for equitable conversion. In addition, the Petitioner's suggested approach contradicts the strong statutory presumption against intestacy. See Id. § 75-2-604. For all of these reasons, this Court should reject the rigid, mechanical approach advocated by Petitioner. See Kikel, 93 A.2d at 445.

5. The Testator's Will converts his realty into personalty.

In this case, the Testator's Will effects an equitable conversion of the Ranch into personal property, because it is clear from the entirety of the Will that the Testator intended his Ranch to be sold. See, e.g., McCaughna, 52 P.2d at 1028 (direction implied from testator's intent). The Will also effects an equitable conversion of the Ranch by necessity, in order to carry out the provision of the Will. It would be impossible to satisfy all of the Testator's debts, the estate taxes, and the costs of

administration, while at the same time satisfying all of the specific bequests made in the Will, without selling the Ranch. See, e.g., Wollard, 232 P.2d at 994 (necessity). The District Court, therefore, correctly treated the Testator's real property as personalty under the doctrine of equitable conversion.

Other courts have reached the same conclusion in similar cases. In Read v. Maryland General Hospital, 146 A. 742 (Md. Ct. App. 1929), the court addressed the issue of whether the proceeds from the sale of the testator's real property passed to the her residual personal property beneficiary or to her heirs in intestacy. Id. at 743. The decedent's will stated:

> **I hereby authorize and empower** my executor . . . to sell all my real estate, either at public or private sale, in parcels, lots, or in its entirety, . . . as in his discretion he may deem proper for the best interest of my estate, and make distribution of the proceeds derived therefrom in conformity with [my will].

Id. (emphasis added). Just as the Petitioner argues in this case, the heirs in Read argued that because the will only "authorize[d] and empower[ed]" rather than commanded the executor to sell the real property, the will did not work an equitable conversion. Id. The court rejected this argument, concluding that the will "manifest[ed] a clear intention" that the testator's real property "be converted into money." Id. The court granted the proceeds of sale to the personal property beneficiary. See id.

In Fahnestock v. Fahnestock, 25 A. 313 (Pa. 1892), the court construed a will which stated: "I hereby empower and authorize my executors to sell all my real estate . . . ." Id. The testator

subsequently stated that "[a]ll the rest and residue of my estate (real and personal) I give, devise, and bequeath as follows . . . ." Id. at 314. One of the beneficiaries of the residuary clause brought suit to partition the testator's real property. Id. The court rejected the request for partition, concluding that the doctrine of equitable conversion applied:

> **It is apparent on the face of the will that the testator intended his property**, real and personal, **should be converted into money**, for distribution, investment, and the collection and payment of interest or income as he had directed.

Id. at 315.

In In re Suppes' Estate, 185 A. 616 (Pa. 1936), the testator's will authorized the sale of her real property but did not contain an express direction to sell. Id. at 617. The will directed that the testator's debts, the costs of "all repairs and taxes necessary to keep up the homestead, as well as the living expenses of the family, be paid 'out of my estate.'" Id. The testator's personal property, however, had been "specifically bequeathed." Id. The testator's "residuary estate, real, personal and mixed, was divided" between five individuals. One of the five residuary beneficiaries brought suit to partition the testator's real property. Id. at 616. The other residuary beneficiaries opposed this action, contending that the proceeds of the testator's real property became personal property under the doctrine of equitable conversion and were to be used for the payment of the testator's debts, the costs of maintaining the homestead, and the family's living expenses. See id. at 616-17.

The court rejected the petition for partition, concluding that the real estate had been converted to personalty by necessary implication. Id. at 617. The court explained:

> The testatrix is presumed to have been aware of the nature of her estate and of the fact that her personal property was entirely insufficient to raise an income sufficient for the [above-enumerated] purposes. She must, therefore, have intended a conversion to carry out these provisions. It would be impossible to pay the decedent's debts, keep up repairs, pay taxes and the living expenses of her family, and carry out the instructions with relation to the children without a sale of the real estate.

Id. The Testator in this case is similarly presumed to have been aware that his estate would be insufficient, without the sale of the Ranch, to accomplish his purposes.

In the case of In re Edwards' Estate, 168 Pa. Super. 471, 79 A.2d 138 (1951), the court addressed the issue of whether proceeds from the sale of the testator's real property passed under the will or by way of intestacy. 79 A.2d at 139. The testator owned three parcels of real estate at her death, but her personal property was insufficient to pay her debts and various cash bequests. Id. The testator's will contained a passing reference to the sale of one of the parcels of real property but otherwise contained no direction or authorization to sell. Id. at 140.

The court discussed the rule of equitable conversion by necessity and concluded that it applied because "the personal property of testatrix was entirely insufficient to pay debts and legacies." Id. The court concluded that any proceeds remaining after the payment of the testator's debts and bequests would pass

under the will as "cash," rather than to her heir in intestacy. Id. at 139-40; see also Wollard, 232 P.2d at 991 (the proceeds of the decedent's real property were converted to personalty and provided "the primary fund for the payment of debts, expenses, and inheritance taxes"); Fahnestock, 25 A. at 315 (equitable conversion applied because it "was not possible to execute certain provisions . . . of the will without a conversion of the real estate . . . into money).

Lastly, even under the rigid, mechanical approach advanced by Petitioner, the Will converts the Testator's real property into personal property. As shown above, the SEVENTH Article of the Will creates a scheme which includes language of command and mandates a sale of the property. The Testator's real property was, therefore, converted to personalty.

C. The Will Disposes of the Real Property Proceeds.

Petitioner's final argument concerning the real property is that the Will does not dispose of the Ranch proceeds. Petitioner contends that the Testator's direction in Article SEVENTH of the Will to add the Ranch proceeds "to my estate" must be construed to mean that the Personal Representative must add the proceeds to the Testator's estate in intestacy. Petitioner notes that the term "estate" could be construed to mean "all the decedent's property, whether passing by will, by trust, or by intestacy." [Appellant's Brief, at 19.] This argument should be rejected for at least four compelling reasons.

First, Petitioner's argument simply begs the question, since there can be no estate in intestacy unless the Will fails to dispose of the residue of the Testator's personal property. Second, the phrase "add the proceeds . . . to my estate" must be construed, if at all possible, to avoid intestacy. In re Estate of Gardner, 615 P.2d at 1217; see Utah Code Ann. § 75-2-604 (1953). The most reasonable construction of that language is that the proceeds should be added to the Testator's estate for use and distribution under the Will. Third, to the extent that the language is ambiguous, the extrinsic evidence establishes that the Testator intended the proceeds to be used for payment of debts, estate taxes, and other expenses, with the residue passing under the Will. [Affidavit of James M. Park, ¶ 5, R. 84.] Finally, the cases applying the doctrine of equitable conversion indicate that converted proceeds pass according to the testator's plan of personal property distribution. See, e.g., Read, 146 A. at 743 (proceeds pass to personal property beneficiaries, not to heirs); In re Edwards' Estate, 79 A.2d at 139-40 (same).

For all of these reasons, the District Court correctly concluded that the Testator died testate as to all of his real property. The real property must be sold and, by virtue of the doctrine of equitable conversion, the proceeds must be treated as personalty for use and distribution under the Will.

POINT IV

THE WILL DISPOSES OF ALL OF THE TESTATOR'S PERSONAL PROPERTY.

Petitioner claims that the Testator died partially intestate as to his personal property for three reasons: (1) the Will contains no clause disposing of the Testator's personal property residue; (2) the SEVENTH Article of the Will recognizes the limited scope of Articles THIRD and SIXTH; and (3) the manner of disposition under Article THIRD, subparagraph E.2. "is inconsistent with disposition of the bulk of the estate." [Appellant's Brief, at 20-26.] These arguments should be rejected.

A. The Relevant Standards of Interpretation Require a Broad Construction of the Will's Personal Property Provisions.

The personal property provisions of the Will must be construed broadly, consistent with the relevant standards of interpretation.

1. The Utah Code provides a broad definition of the term "personal property."

The Utah Uniform Probate Code defines the term "property" very broadly: "'Property' includes both real and personal property or any interest therein and means anything that may be the subject of ownership." Utah Code Ann. § 75-1-201(33) (Supp. 1991). The Utah Code also supplies a broad definition of the term "personal property:"

> "Personal property" includes every description of money, goods, chattels, effects, evidences of rights in action, and all written instruments by which any pecuniary obligation, right, or title to property is created, acknowledged, transferred,

> increased, defeated, discharged, or diminished, and every right or interest therein.

Utah Code Ann. § 68-3-12(2)(m) (Supp. 1991). The dispositive provisions of the Will dealing with "personal property" must, therefore, be construed broadly in light of this definition.

2. The personal property provisions must be construed so far as possible to avoid intestacy.

The strong statutory presumption against intestacy requires the Court to adopt "any reasonable construction [of the Will] so as to avoid a conclusion of intestacy." In re Estate of Gardner, 615 P.2d at 1217; see Utah Code Ann. § 75-2-604 (1953). The presumption is particularly strong when the testator has employed language resembling a residuary clause. See, e.g., North Carolina Nat'l Bank v. Apple, 95 N.C. App. 606, 383 S.E.2d 438, 440 (1989); Estate of Rose, 772 S.W.2d at 889; In re Estate of Shaw, 182 Ill. App. 3d 847, 538 N.E.2d 643, 645 (1989). No particular words are necessary to create a residuary clause. See, e.g., In re Agius' Will, 174 N.Y.S.2d 550, 552 (Sur. Ct. 1958).

3. The testator's use of different terms signifies different meanings.

There is a strong presumption that when a testator uses different terms, "a different meaning must have been intended." Davisson v. Sparrow, 97 N.E.2d 694, 695 (Ohio Ct. App. 1949). Thus, "[i]f different words are employed with reference to a given subject matter, it will be assumed that the testator intended a different meaning when he employed such different expressions." Id.

B. The THIRD and SIXTH Articles of the Will Dispose of All of the Testator's Personal Property.

The THIRD and SIXTH Articles of the Will are the main dispositive provisions of the Will. The SIXTH Article devises to Curtiss S. Scarritt, Jr. "all articles of personal, household or domestic use or adornment," with certain exceptions. This language ostensibly relates to the Testator's personal effects and to the tangible personal property associated with his home. The only exceptions noted are those relating to the personal property associated with the Testator's business and the specific items of personal property distributed in kind under the THIRD Article of the Will.

The THIRD Article of the Will begins with a clear and unmistakable expression of the Testator's intent to dispose of all of his personal property. That Article provides:

> All the rest, residue, and remainder of my estate, both real and personal, of whatsoever kind and nature and wheresoever the same may be situated of which I shall die seized or possess to which in any way I may be entitled at the time of my death [except the Horace S. Scarritt Trust], I give, devise, and bequeath as follows: . . . .

The Testator then makes specific personal property devises in subsections A through E.1. of Article THIRD. Subsection E.2. then provides a mechanism for disposition of the "remaining items" of the Testator's "personal property:"

> The distribution of **the remaining items of personal property** should be determined by Curtiss S. Scarritt, Jr., Rodney K. Orton and James M. Park.

(Emphasis added.) The District Court concluded from a review of the entire will that this section created a valid power of appointment in the named individuals, to dispose of the residue of the Testator's personal property. [Order of Formal Probate, Conclusions, ¶ 11, R. 35.] This Court has held that no particular words are necessary to create a power of appointment, In re Estate of Lewis, 738 P.2d 617, 619-20 (Utah 1987), and Petitioner has not challenged the District Court's conclusion that Article THIRD, subsection E.2., created a valid power of appointment.

The preamble to Article THIRD and the entirety of the Will demonstrate that the District Court reasonably concluded that the Testator intended the phrase "remaining items of personal property" as a residuary clause to pass all of the Testator's personal property residue. This construction is consistent with the broad definition of "personal property" provided by the Utah Code.

The Utah Uniform Probate Code contains another provision which strongly supports the District Court's construction of the term "remaining items of personal property." Section 75-2-513 provides:

> [A] will may refer to a written statement of list to dispose of **items of . . . personal property** not otherwise specifically disposed of by the will, **other than money, evidences of indebtedness, documents of title**, and securities, and property used in trade or business.

Utah Code Ann. § 75-2-513 (1953). This provision includes within the term "items . . . of personal property," both "money" and its equivalents.[11] The Testator's use of the term "remaining items of

[11]Otherwise, this section would not have had to **exclude** those types of personal property from the scope of this provision.

personal property" should thus be construed as including all of the "remainder" (residue), of the Testator's "personal property," including the proceeds from the sale of his real property and any remaining "tangible personal property," as referenced in the SEVENTH Article of the Will.

The statutory presumption against intestacy also requires the Court to give the "broadest meaning practicable" to the terms "personal property" and "remaining items of personal property,"[12] in order to avoid intestacy. Quick v. Owens, 198 S.C. 29, 15 S.E.2d 837, 845 (1941); see Utah Code Ann. § 75-2-604 (1953); In re Estate of Gardner, 615 P.2d at 1217. For example, in Barnes v. Evans, 102 N.C. App. 428, 402 S.E.2d 164 (N.C. 1991), aff'd, ____ S.E.2d ____ (N.C. 1992), the court construed the phrase "remaining cash and bonds" broadly to include "certificates of deposit." 402 S.E.2d at 165-66. The court based its conclusion, in large part, on the strong presumption against intestacy, noting that "[i]t is not reasonable to infer that [the decedent] intended that almost one-half of her considerable estate--nearly one-half million dollars in value--be left adrift in the unchartered and uncertain seas of intestacy." Id. at 166.

It is similarly unreasonable to infer that the Testator intended a substantial portion of his estate, an amount well over

---

[12]The presumption against intestacy applies with particular force to the phrase "remaining items of personal property," because the Testator employed language resembling a residuary devise. See, e.g., North Carolina Nat'l Bank, 383 S.E.2d at 440; Estate of Rose, 772 S.W.2d at 889.

a million dollars,[13] to be "left adrift in the unchartered and uncertain seas of intestacy." Id. For this reason, the provisions of the THIRD Article of his Will should be construed broadly to dispose of all of the "rest, residue, and remainder" of the Testator's personal property.

1. Article SIXTH and Article THIRD, subsection E. cannot both be reasonably construed as devises of "personal effects."

Petitioner contends, however, that the THIRD and SIXTH Articles of the Will do not dispose of all of the Testator's personal property. The Petitioner maintains that the SIXTH Article of the Will should be construed as referring exclusively to the Testator's "personal effects." [Appellant's Brief, at 20.] The Petitioner subsequently examines the THIRD Article of the Will, Subsection E., and asserts that the terms "personal property" and "remaining items of personal property" also refer exclusively to the Testator's "personal effects." Petitioner suggests that the location and language of Article THIRD, Subsection E., show that Subsection E does not "affect all remaining personal property." [Appellant's Brief, at 22-23.] These arguments should be rejected.

a. Petitioner's narrow construction of the Will is inconsistent with the all-encompassing language of Article THIRD.

The first paragraph of the THIRD Article of the Will expresses in clear and unmistakable terms the Testator's intent to dispose of all of his personal property. It is, therefore, incumbent upon

---

[13]It is anticipated that the sale of the Testator's real property alone will bring in over one million dollars.

the Court to effectuate that intent, if at all possible. See Utah Code Ann. §§ 75-2-603, 75-1-102 (1953); In re Estate of Wallich, 420 P.2d at 42. Petitioner's narrow construction of Article THIRD, Subsection E. as merely a "personal effects" provision contradicts the Testator's clear intent expressed at the beginning of the Article. The Personal Representative's construction of Article THIRD, Subsection E.2 is therefore more reasonable than the interpretation advanced by Petitioner.

b. Petitioner's construction of Articles THIRD and SIXTH violates the presumption that different terms have different meanings.

Petitioner's construction of Articles THIRD and SIXTH also violates the presumption that a testator's use of different terms signifies different intended meanings. In his Will, the Testator employed the following diverse terms in referring to his property: "real property" (SIXTH Article); "personal property" (Will, THIRD Article); "all articles of personal, household or domestic use or adornment" (Will, SIXTH Article); "tangible personal property" [Will, SIXTH Article]; and "remaining items of personal property" (Will, THIRD Article, Subsection E.2.). Because each of these terms is different, they must all be presumed to have different meanings. See Davisson, 97 N.E.2d at 695.

The Petitioner suggests, contrary to this cannon of construction, that the Testator did not intend different meanings when he used these different terms. He argues that the terms "personal property" and "remaining items of personal property," as used in Article THIRD subsection E., and the term "all articles

of personal, household or domestic use or adornment," as used in Article SIXTH, must both be construed as referring to the Testator's "personal effects." The Petitioner also assigns the exact same meaning to the different words "items" and "articles" as used in the THIRD and SIXTH Articles, even though the word "items" is arguably more generic and broader in scope than the word "articles." Finally, the Petitioner's construction of the Will gives the terms "personal property" and "remaining items of personal property," as used in Subsection E, a **more restrictive** meaning than the term "tangible personal property." [Will, SEVENTH Article.] These significant interpretive inconsistencies in the Petitioner's argument demonstrate the flaws in the Petitioner's construction of the Will.

The only reasonable construction of these different terms leads to the conclusion that the Testator intended to dispose of all of his personal property under the Will:

> The term "all articles of personal, household or domestic use or adornment" likely refers to the Testator's personal effects and, with the exceptions noted, the personal property associated with the Testator's home.
>
> The term "tangible personal property" refers to the Testator's non-monetary personal property.
>
> The term "personal property," being broader than the term "tangible personal property," must refer, without limitation, to all of the Testator's personal property "of whatsoever kind and nature and wheresoever the same may be situated . . . ."

[Will, THIRD Article.] It is important to note that before employing the term "personal property" in the THIRD Article of the Will, the Testator states that he is devising "All the rest, residue, and remainder of his estate, both real and personal, of whatsoever kind and nature . . . ."

The term "remaining items of personal property," therefore, must be construed as referring to "all the rest, residue, and remainder" of Testator's "personal property," other than those items of personal property specifically devised in subsections A through E.1., of Article THIRD, and the personal effects, which are disposed of in Article SIXTH.

Under these appropriate definitions, the dispositive provisions of the Will are sufficiently broad to dispose of all of the Testator's personal property.

To the extent that the Petitioner has created any ambiguity or uncertainty in the terms used in Articles THIRD, SIXTH, and SEVENTH of the Will, Utah law provides two means of resolving the dispute. First, the statutory presumption against intestacy requires the Court to adopt the Personal Representative's "reasonable construction" of the Articles THIRD and SIXTH, which leads to testacy, over the Petitioner's construction of those provisions, which would result in intestacy as to the bulk of Testator's estate. In re Estate of Gardner, 615 P.2d at 1217; see Utah Code Ann. § 75-2-604 (1953).

Second, to the extent that the terms "personal property," "remaining items of personal property," and "all articles of

personal, household and domestic use and adornment" are ambiguous, extrinsic evidence is admissible to show the Testator's intent. See Estate of Ashton, 804 P.2d at 542-43; Godfrey, 811 P.2d at 1251. The extrinsic evidence in this case establishes that the Testator intended Article THIRD, Subsection E.2., to pass all of the Testator's personal property residue. [Affidavit of James M. Park ¶ 12, R. 86.]

2. Article SEVENTH does not recognize that personal property would be left in the estate.

Petition also argues that the SEVENTH Article of the Will recognizes the limited scope of Article THIRD. Petitioner suggests that the District Court improperly construed the Testator's instruction to sell any "tangible personal property and livestock included in my estate and not effectively disposed of pursuant to Articles THIRD and SIXTH hereof" as a "boilerplate catch-all phrase." These arguments should be rejected.

a. Article SEVENTH merely recognizes that some articles of "tangible personal property" may not be distributed in kind.

The District Court properly concluded that the language of the SEVENTH Article does not indicate that the Testator intended to die partially intestate. In light of the strong presumption against intestacy and the Testator's other clear indications of his intent, a reasonable construction of the language quoted by Petitioner is that the Testator intended the Personal Representative to sell any miscellaneous items of "tangible personal property" that were not distributed **in kind** under the Will. Those proceeds were then to be "added to [the] estate" for use and distribution as money. This

construction draws additional support from the fact that the SEVENTH Article also references the sale of "livestock . . . not effectively disposed of pursuant to Articles THIRD and SIXTH," when the Testator knew that Article THIRD, Subsections C. and D. had already disposed of "**all** race horse related livestock" and "**all other** livestock and saddle horses . . . ." The District Court, therefore, properly viewed the provision in question as somewhat of a "boilerplate catch-all phrase."

In the case of Kuiken v. Simonds, 3 N.J. 480, 70 A.2d 740 (1949), the court faced a similar textual difficulty in a will. The will directed the testator's executors to sell all of his real property, while a subsequent phrase directed the executors "to divide all my then remaining estate both **real** and personal." 70 A.2d at 743 (italics in original). The court recognized that no real property would remain in the estate after the executors' sale and simply ignored the later reference as inconsistent with the testator's obvious intent. Id.

Similarly, even if the language and placement of Articles THIRD, SIXTH, and SEVENTH in the Testator's Will provides some interpretive difficulty, this Court should effectuate the Testator's obvious intent that his real property and remaining "tangible personal property" be sold and that proceeds be added to his estate for use and distribution under the Will. As the District Court aptly stated "[Any] technical problems [in the Will] should not be applied in such a hypercritical fashion as to defeat

the obvious intent of the testator." [Order of Formal Probate, Conclusions, ¶ 7, R. 34.]

b. The provisions of the Will should not be applied rigidly, in derogation of Testator's clear intent to dispose of all property.

The provisions of the Will should not be construed rigidly, one after another, without regard to the Testator's overall intent and plan of distribution. See Utah Code Ann. § 75-1-102 (1953); In re Estate of Wallich, 420 P.2d at 42. The fact that the sale of the Ranch, together with any "tangible personal property" not distributed in kind under Article THIRD, might not occur until after the Personal Representative's initial distributions under Articles THIRD and SIXTH does not indicate that the Testator intended the residue of his personal property to pass in intestacy. It simply means that the provisions of the Will must be construed together and applied flexibly to effectuate the Testator's intent that his real property and remaining "tangible personal property" be sold and that the proceeds of sale be "added to" his estate for use distribution under the Will. It would be a perfectly reasonable construction of the Will for the Personal Representative to make distributions of personal property in kind, as directed in paragraphs THIRD and SIXTH; to sell the Ranch and any remaining "tangible personal property;" and then to distribute the sale proceeds as a "remaining item[] of personal property."

3. The manner of disposition of Article THIRD, Subsection E.2. is completely consistent with disposition of the residue of Testator's estate.

Petitioner argues lastly, that the power of appointment granted to the Personal Representative, to James M. Park, and to the Testator's son, regarding the "remaining items of personal property," [Will, Article THIRD, Subsection E.2.], is inconsistent with an intent to dispose of anything of any real value. Petitioner suggests that this provision provides a manner of distribution which "resembles a common method of disposing of miscellaneous personal effects, divided up as close friends may agree. [Appellant's Brief, at 24.]

Petitioner's construction of this provision should be rejected because more a reasonable view of this provision is available and will avoid intestacy. If Article THIRD, Subsection E.2., was intended as nothing more than a bequest of miscellaneous "personal effects," the Testator would not have thought it sufficiently important to include on the committee the Personal Representative; his attorney, James M. Park; and his son, Curtiss S. Scarritt, Jr. A request to the Personal Representative would have been more than sufficient. The District Court also found it "significant that the testator included in this committee two of his close personal friends and his son Curtiss S. Scarritt, Jr.," Order of Formal Probate, Findings, ¶ 14, R. 31-32, indicating that the scope of this provision is much greater than Petitioner suggests.

C. Alternatively, the Court Could Reasonably Conclude that the Testator's Personal Property Residue Passed under Article SIXTH of the Will.

Alternatively, if this Court were to conclude that the only reasonable interpretation of the term "personal property," as used in Article THIRD, subsection E. of the Will, referred to the Testator's "personal effects," the phrase "all articles of personal, household, and domestic use or adornment," as used in Article SIXTH, should be construed more broadly. While this phrase ostensibly refers to the Testator's personal effects and the property associated with his home, the Testator made the effort to exclude, among other things, the personal property associated with his ranching business. These exclusions suggest a broader construction of the phrase "articles of personal, household and domestic use" than "personal effects." This bequest also follows the bequests made in Article THIRD, suggesting that the Testator was disposing of all other personal property that remained. The Testator also made certain to except out of this devise the personal property "selected and distributed" pursuant to Article THIRD.

In In re Scheiner's Will, 215 Iowa 1101, 247 N.W. 532 (Iowa 1933), the court construed the similar phrase, "[a]ll my household and personal property." The court concluded that the testator did not intend to die intestate and that the phrase would be construed to include **all** of the testator's personal property. 247 N.W. at 533-34. It would, therefore, be a reasonable construction of the Will that the Testator's personal property residue passed under

Article SIXTH of the Will. This construction would likewise be consistent with the Testator's unmistakable intent to pass all of his property under the Will and the statutory presumption against intestacy.

In light of the Testator's clear intent to dispose of all of his personal property, as established by the language of the will, the definitions provided by the Utah Code, the strong presumption against intestacy, and the Testator's use of different terms to describe various types of personal property, the Petitioner's claim that the Testator died partially intestate as to his personal property should be rejected.

POINT V

THE TESTATOR DID NOT INTEND TO PASS A MAJORITY OF HIS ESTATE BY INTESTATE SUCCESSION.

Finally, the NINTH Article of the Will clearly manifests the Testator's intent with respect to the Petitioner:

> I make no provision for my son, Ryan Winthrop Scarritt, for the reason that he will be well-provided for, following my death, under the will of my father, Horace S. Scarritt.

The Testator included this provision in the Will, knowing that Petitioner would share in trust properties amounting to several million dollars. [Will, Article THIRD; Hearing Transcript, p. 27.] The NINTH Article, therefore, clearly reveals the Testator's intent that the Petitioner receive none of the Testator's property, whether real or personal. It also explains the Testator's reasons for omitting Petitioner from the Will.

Since the Testator is presumed to know the law of intestate succession, see, e.g., Wallich v. Wallich, 10 Utah 2d 192, 350 P.2d 614, 616 (1960), which would grant half of any intestate assets to the Petitioner, see Utah Code Ann. § 75-2-103(1)(a) (1953), the Petitioner's claim that the Testator intended to die intestate as to almost his entire estate is completely inconsistent with the Testator's intent as clearly expressed in the NINTH Article of the Will. The District Court aptly concluded:

> The testator in paragraph NINTH of the Will stated his express intent to make no provision for his son Ryan W. Scarritt for the reason that Ryan was or would be well provided for under the Will of Horace S. Scarritt. That intent is crystal clear, and were the Court to find that Mr. Scarritt intended to die intestate, it would be in direct contravention of the express provisions of paragraph NINTH of the Will.

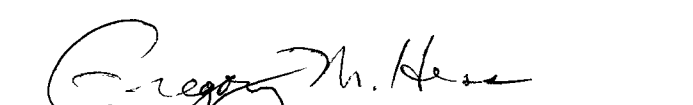
[Order of Formal Probate, Findings, ¶ 10, R. 31.]

CONCLUSION

For all of these reasons, the Personal Representative respectfully requests that the order of the District Court be affirmed.

RESPECTFULLY SUBMITTED this 1st day of April, 1992.

KIMBALL, PARR, WADDOUPS, BROWN & GEE



Michael M. Later, Esq.
Gregory M. Hess, Esq.
Attorneys for Rodney K. Orton,
Personal Representative/
Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 1992, I served four copies of the foregoing "Appellee's Brief" on the following by depositing the same in the United States Mail, First Class postage pre-paid, properly addressed to:

David Nuffer, Esq.
SNOW, NUFFER, ENGSTROM & DRAKE
90 East 200 North
P.O. Box 400
St. George, UT 84771-0400

Gregory M. Hess

Gregory M. Hess

ADDENDUM

Affidavit of James M. Park in Opposition to the Petition of Ryan W. Scarritt [R. 83-97.]

Michael M. Later (3728)
Gregory M. Hess (5611)
KIMBALL, PARR, WADDOUPS, BROWN & GEE
185 South State Street, Suite 1300
P.O. Box 11019
Salt Lake City, Utah 84147
Telephone: (801)532-7840

Michael W. Park (2516)
THE PARK FIRM
2 West St. George Boulevard
Ancestor Square Towers Bldg., Suite 32
P.O. Box 2438
St. George, Utah 84771
Telephone: (801) 673-8689

Attorneys for Rodney K. Orton, in his capacity as Personal Representative

---

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR

WASHINGTON COUNTY, STATE OF UTAH

IN THE MATTER OF THE ESTATE OF CURTISS S. SCARRITT, Deceased.	AFFIDAVIT OF JAMES M. PARK IN OPPOSITION TO THE PETITION OF RYAN W. SCARRITT Probate No. 913500084

STATE OF UTAH)
: ss.
COUNTY OF IRON)

James M. Park, being first duly sworn upon oath, deposes and says:

1. I was admitted to the practice of law on May 11, 1989, and am a member in good standing of the Utah State Bar.

2. I drafted the Last Will and Testament of Curtiss S. Scarritt (the "Will"), which is the subject of the "Petition for Formal Probate of Will, Construction of Will, Declaration of

Partial Intestacy, and Supervised Administration" filed herein by Ryan W. Scarritt on or about July 12, 1991 (the "Petition").

3. Prior to drafting the Will, I discussed with Curtiss S. Scarritt the manner in which he desired to dispose of his estate.

4. During our discussions, Curtiss S. Scarritt clearly stated that he intended all of his property, whether real or personal, and wherever situated, to pass under his will and not by way of intestate succession.

5. Curtiss S. Scarritt also clearly expressed his intent that the real property he owned in Virgin, Utah (the "Ranch Property") be sold, that the proceeds thereof be added to his estate for use in paying his debts, the estate taxes, and the expenses of administration, and that the remaining proceeds be distributed in accordance with his will. He emphatically stated that under no condition did he want the Ranch Property itself to pass into the hands of either of his sons, Curtiss S. Scarritt, Jr., or Ryan W. Scarritt.

6. Curtiss S. Scarritt clearly expressed his intent that, with the exception of several specific articles, his personal effects and the personal property associated with his home should be devised to his son, Curtiss S. Scarritt, Jr.

7. Curtiss S. Scarritt further expressed his intent that the residue of his personal property, of whatever kind or nature, including the remaining proceeds from the sale of the Ranch Property, be left in the power of Rodney K. Orton, Curtiss S.

Scarritt, Jr., and myself largely for distribution to Curtiss S. Scarritt, Jr., after the payment of the debts, estate taxes, and expenses of administration.

8. Curtiss S. Scarritt clearly stated his intent that none of his property, of whatever kind or nature, or wherever situated, pass to his ex-wife, Donna L. Scarritt, or to his son, Ryan W. Scarritt.

9. After completing my discussions with Curtiss S. Scarritt, I drafted the Will. Curtiss S. Scarritt and I met subsequently to review its various provisions.

10. During our review of the THIRD Section of the Will, Curtiss S. Scarritt clearly expressed his intent and understanding that the phrase "the remaining items of personal property" as used in subsection E.2. meant and included "(a)ll the rest, residue, and remainder" of his personal property, of "whatsoever kind and nature and wheresoever the same may be situated," other than the personal property he devised in other provisions of the Will and the property associated with the Horace S. Scarritt Trust. In short, Curtiss S. Scarritt intended and understood subsection E.2. to be a residual personal property clause.

11. During our review of the SIXTH Section of the Will, Curtiss S. Scarritt clearly expressed his intent and understanding that the language "all articles of personal, household or domestic use or adornment, which may be included in my Utah estate at my death," excepting the personal property associated with his ranch business, and the personal property specifically devised under the

THIRD Section of the Will, meant and included essentially all of his personal effects and the other articles of personal property associated with his home.

12. During our review of the SEVENTH Section of the Will, Curtiss S. Scarritt clearly expressed his intent and understanding that the language used therein required his personal representative to sell the Ranch Property and to add the proceeds of the sale to his estate for use in paying his debts, the estate taxes, and the expenses of administration. He also clearly expressed his intent and understanding that the remaining proceeds of the sale of the Ranch Property would be one of "the remaining items of personal property" that would be distributed in accordance with subsection E.2. of the THIRD Section of the Will.

13. Curtiss S. Scarritt further expressed his intent and understanding that the language "until such time as the ranch is sold or for a period of time which shall be left to the sole discretion of my personal representative: and "at such time or times and upon such terms and conditions as shall seem advisable," as used in the SEVENTH Section of the Will, meant only that the timing, terms, and conditions of the sale of the Ranch Property would be left to the discretion of his personal representative, not that the sale of the Ranch Property itself would be discretionary.

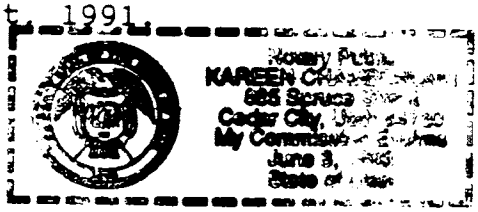
14. At the completion of our review of the Will, Curtiss S. Scarritt expressed his intent and understanding that the Will

disposed of all of his property, of whatever kind or nature, and wherever situated, and that none of his property would pass by way of intestate succession.

DATED this 12th day of August, 1991.

JAMES M. PARK

SUBSCRIBED AND SWORN TO before me this 12th day of August, 1991.



NOTARY PUBLIC
Residing at: Cedar City, Utah

My Commission Expires:
June 8, 1993